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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RANDY GIBSON, Defendant and Appellant.	B231947 (Los Angeles County Super. Ct. No. NA083814)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Randy Gibson (appellant) of continuous sexual abuse of a child under 14 years of age. (Pen. Code, § 288.5, subd. (a).)[1] In a separate trial, the court found that he had suffered two prior felony convictions within the meaning of section 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i), two prior serious felony convictions within the meaning of section 667, subdivision (a), and three prior felony convictions within the meaning of section 1203, subdivision (e)(4). He was sentenced to 58 years to life in state prison. He contends there is insufficient evidence to support the conviction. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

K. Smith (Mother) has two children, S.R. (a daughter, born Jan. 1994, hereinafter referred to as S.) and K.R. (a son, born Dec. 1997, hereinafter referred to as K.). Mother met appellant in 2006, and shortly thereafter, Mother, appellant, and the two children moved to an apartment on 5th Street in Long Beach, which they shared with other family members (the 5th Street apartment). In 2007, appellant, Mother, S., and K. moved into an apartment of their own on Ackerfield in Long Beach (the Ackerfield apartment).

S. testified at trial that at the 5th Street apartment when she was 12 years old, appellant walked into the bathroom while she was taking a shower and made comments about her body. On other occasions, appellant touched her breasts. When S. told Mother, Mother accused S. of not wanting appellant and Mother to be together. On another occasion, when appellant rubbed his penis on S., she told Mother, and Mother laughed as if it were a joke. S. said appellant touched her on the vagina over 30 times and her breasts over 20 times before she was 14. After moving to the Ackerfield apartment, when she was 14, appellant poked her vagina over her clothes with his fingers. In another incident, while S. was lying face down on her bed watching television, appellant

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[1] All further statutory references are to the Penal Code.

came into her room and laid down on top of her. He moved back and forth over her buttocks.

K. testified that when he lived in the Ackerfield apartment, he saw appellant touching S.'s breasts on multiple occasions. He also saw appellant touch S. on her buttocks. K. sometimes told appellant to stop touching S.

On April 8, 2009, S. and K. were home with appellant. S. took a shower and walked back to her room with a towel wrapped around her. Appellant, wearing a bathrobe, pulled her into his room and threw her on his bed. The towel S. was wearing fell to the floor. She fought with appellant. After several minutes, appellant told S., "Get your ass out of my room." S. went to her room, phoned her Mother, and asked her to come home because she and appellant had had a fight. When Mother did not return home, S. told K. to come with her to go next door. Appellant grabbed S. and began choking her. K. tried to call 911 on the apartment phone, but appellant grabbed the phone and threw it on the floor. Appellant threatened to kill K. Eventually S. was able to call 911 from her cell phone. Mother did not return home until after the police had arrived.

Mother testified that S. had behavioral problems and anger issues since she was five years old. S. had many discipline problems at school and had been caught in the boys' bathroom engaging in sexual activity with a boy. Mother never saw appellant touch S. inappropriately. When S. was 10 years old, she complained that one of Mother's boyfriends, Melvin, had touched her inappropriately. S. told Mother that she made up the story because she wanted her father's attention. In December 2009, less than three months before appellant's trial, she told Mother that nothing happened between her and appellant and that she had made everything up because she wanted attention.

S.'s grandmother, Debra, testified that S. had previously accused Mother's ex-boyfriend Melvin of fondling her. S. did not want Debra to call the police. Debra said that S. had a vivid imagination.

An uncle who was living with the family in the 5th Street apartment testified that he never saw appellant rubbing up against S. and S. never complained about appellant touching her.

In rebuttal, a counselor at S.'s high school testified that S. did not have any extreme discipline problems. The counselor was unaware of an incident where S. was in the boys' bathroom. An investigator who interviewed Debra said that Debra never mentioned S.'s accusations against Melvin or the fact that S. had a vivid imagination.

Appellant was initially charged with one count of continuous sexual abuse of a child. (§ 288.5.)[2] The information was later amended to add two counts of committing a lewd act upon a child under the age of 14. (§ 288, subd. (a).)[3]

When the prosecution moved to amend the information to add counts 2 and 3, she specified that they were added as alternative counts to the charge in count 1. The court granted the motion to amend "with the understanding that these are alternative counts. [¶] . . . [¶] He can't be convicted of all of this stuff."

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[2] Section 288.5 provides that: "(a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years. [¶] . . . [¶] (c) No other act of substantial sexual conduct, as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, or lewd and lascivious acts, as defined in Section 288, involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. . . ."

[3] Section 288, subdivision (a) provides that: "Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

The jury was instructed with the elements of section 288.5, subdivision (a) for count 1 and section 288, subdivision (a) for counts 2 and 3, as well as the lesser included crimes of assault and battery.

During closing statements, the prosecutor told the jury: "The defendant in this case is charged with two crimes: these crimes are in the alternative. Count 1 is the count of continuous sexual abuse of a child under the age of 14 . . . . *If you find the defendant guilty of continuous sexual abuse of a child under 14, then you are not to consider the alternative charges.* And there are two alternative charges and those are the charges of lewd act on a child under the age of 14. . . . But just to make it clear to you, when you are back there deliberating, when you see continuous sexual abuse of a child under the age of 14, if you find him not guilty of that charge, you are to consider the two lesser charges. If you find him not guilty of the lessers, then you consider the alternative counts. *However, if you find him guilty of continuous sexual abuse of a child under 14, then you don't consider these alternative counts at all nor the lesser of the alternative counts.*" (Italics added.)

Defense counsel argued in closing that S. was lying. In reply, the prosecutor repeated that "the defendant is guilty of continuous sexual abuse . . . [a]nd if you do not find that charge — if you do not find him guilty of that, then I ask you to find him guilty of both counts of a lewd act on a child under the age of 14 *in the alternative*." (Italics added.)

When the jury reached its verdict, the clerk stated in open court that the jury found appellant guilty on count 1. The jury was polled and was asked to leave the courtroom while the parties discussed the pending trial on appellant's prior convictions. After appellant waived jury trial on the prior allegations, the jury was excused. No verdicts were recorded for counts 2 and 3.

DISCUSSION

Appellant's sole contention is that there is insufficient evidence to support his conviction for continuous sexual abuse. He correctly points out that section 288.5, subdivision (a) requires that the alleged offender must either engage in three or more acts of substantial sexual conduct, as defined by section 1203.066, subdivision (b),[4] with a child under the age of 14 or commit three or more lewd acts, as defined by section 288, upon a child under the age of 14. Appellant asserts the jury "found him not guilty of touching [S.] with a lewd or lascivious intent. Therefore, he could not have been found guilty of continuous sexual abuse based on violations of section 288, subdivision (a). Therefore, the only factual theory of liability remaining was that [he] engaged in three acts of substantial sexual conduct as defined in section 1203.066, subdivision (b). Simply put, there is no proof of three such acts."

Appellant's argument rests on a fatally flawed premise. The jury did not conclude he was not guilty of violating section 288, subdivision (a). The prosecutor properly informed the jury that if it found appellant guilty of continuous sexual abuse as alleged in count 1, it was not to consider the charges of lewd acts upon a child under the age of 14 as alleged in counts 2 and 3. (*People v. Johnson* (2002) 28 Cal.4th 240, 248 [a defendant may not be convicted of section 288.5 and the specific sexual offenses committed during the same time period].) In accordance with the prosecutor's instructions, after convicting appellant on count 1, the jury did not return verdicts on counts 2 and 3. Under these circumstances, the jury's failure to return a verdict on counts 2 and 3 does not equate to an acquittal of those charges. Because, as appellant so aptly noted, the prosecution presented no evidence of substantial sexual conduct between appellant and S., the jury must have found that appellant committed three or more lewd acts as defined by section

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[4] Section 1203.066, subdivision (b) states that substantial sexual conduct "means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender."

288 in convicting him of violating section 288.5. As appellant does not dispute the jury could have properly concluded that he committed three or more lewd acts upon S., we need go no further.

DISPOSITION

The judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.